Editor's note: Appealed -- dismissed, Civ.No. 83-1614 PHX WEC (D.Ariz. Sept. 4, 1985)

UNITED STATES
v.
EVA M. POOL ET AL.

IBLA 82-40 Decided June 27, 1983

Appeal from decision of Administrative Law Judge Robert W. Mesch declaring invalid two lode mining claims. AZ-14904.

Affirmed.

1. Mining Claims: Contests -- Mining Claims: Mineral Lands

If a lode mining claim is supported by a discovery, it necessarily follows that the land is mineral in character. If a claim is not supported by a discovery, it is invalid and it would be immaterial whether the land is mineral in character. In any event, the tests for determining the mineral character of land and whether a discovery of a valuable mineral deposit has been made are essentially the same.

2. Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Mining Claims: Marketability -- Mining Claims: Withdrawn Land

In order to become entitled to a mining claim, a claimant must establish the presence of a valuable mineral deposit. 30 U.S.C. § 22 (1976). A valuable mineral deposit exists where the mineral found is of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894). This is the "prudent man test," approved by the U.S. Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905). It has been

refined to require a showing of marketability, i.e., that the mineral can be presently extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968). Where a claim is located on land subsequently withdrawn from appropriation under the mining laws, the claim must be supported by a discovery at the time of withdrawal, as well as the date of the hearing into its validity. Cameron v. United States, 252 U.S. 450 (1920).

3. Administrative Procedure: Burden of Proof -- Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Generally -- Rules of Practice: Appeals: Burden of Proof

When the Government contests the validity of a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. If a prima facie case is presented, the mining claimant then has the burden of overcoming this showing by a preponderance of the evidence.

APPEARANCES: Stephen P. Shadle, Esq., Yuma, Arizona, for appellants.

OPINION BY ADMINISTRATIVE JUDGE MULLEN

Eva M. Pool and others 1/ have appealed from a decision of Administrative Law Judge Robert W. Mesch, dated September 1, 1981, declaring invalid the Honeycomb and Sugar Loaf lode mining claims.

The proceeding was initiated on September 30, 1980, by the Arizona State Office, Bureau of Land Management (BLM), at the request, and on behalf of the Army Corps of Engineers, Department of the Army, when BLM issued a contest complaint pursuant to 43 CFR 4.451.

The claims that are the subject matter of this action are also the subject of a condemnation action brought by the United States in the United States District Court for the District of Arizona. The contest proceeding was initiated in order to determine the validity of the claims and whether the mining claimants are entitled to compensation. The complaint charged that: "A. Valuable minerals have not been found within the limits of said mining claims to constitute a valid discovery within the meaning of the

1/ The appellants are Eva M. Pool, Jean Emanuel, Wilda Louise Myrick, Silvia Marjorie Pool, Ronald A. Pool, and Phillip Emanuel, successors in interest to Will V. Pool and other original locators of the claims.

mining law either presently or as of August 24, 1962; and B. The land embraced within the claims is non-mineral in character."

Appellants filed a timely answer and denied the charges in the complaint. A hearing was held on March 30, 1981, at Yuma, Arizona. Following the hearing, posthearing briefs were filed on behalf of appellants and contestant BLM. On September 1, 1981, Judge Mesch rendered a decision declaring the claims null and void. An appeal to this Board was filed by appellants in a timely manner. A statement of reasons was also filed.

[1] We will first address the second allegation in the complaint. If a lode mining claim is supported by a discovery, it necessarily follows that the land is mineral in character. If a claim is not supported by a discovery, it is invalid and it would be immaterial whether the land is mineral or non-mineral in character. In any event, the tests for determining the mineral character of land and whether a discovery of a valuable mineral deposit has been made are essentially the same in this case. See United States v. Williamson, 75 I.D. 338 (1968); McCall v. Andrus, 628 F.2d 1185 (9th Cir. 1980).

The Sugar Loaf lode mining claim was located in 1940. The Honeycomb claim was located in 1947. At some time prior to 1953 a leasehold interest in the property was acquired by the Department of the Army (BLM Exh. A). The land was withdrawn from mineral location in 1962. There is no dispute regarding the location of the claims prior to withdrawal (Tr. 6).

The claims were located for mica (Tr. 23). There are two types of mica produced. These are sheet mica and scrap mica (Tr. 8, 31). Sheet mica is a specialty item and little is produced or consumed (1978-79 Bureau of Mines Minerals Yearbook). The mineral examiner found no sheet mica (Tr. 18) and the expert witness for appellants found a couple of pieces of material about 2-1/2 inches in diameter which he claimed to be sheet mica (Tr. 31). No evidence was presented which would demonstrate that there was any quantity of sheet mica, however. No evidence was given other than there might be potential for sheet mica (Tr. 32).

The claims in question were examined by mineral examiners on behalf of the contestant. At the time of the examination, mineral examiners were accompanied by the appellants' representative (Tr. 7). Mineral Examiner Nelson testified as follows:

> Q. What did you do in relation to these samples as to being able to draw a comparison as to the validity or invalidity of the claim?
>
> A. Well, I believe that the mica material itself is of a quality, and there actually appears to be a sufficient quantity of material, that a person -- that this material could go into the -- be sole [sic] in the market place as a commodity that could be purchased for the various materials that it goes into. The only problem was that the people that I contacted in Los Angeles and San Diego in regards to paint and the mica mineral brokers, the actual market is for about 12,000 tons a year of this material. It's presently all being supplied from North Carolina, and

you would have reason to believe that it would be much cheaper to set up a mine someplace in Arizona or someplace closer than North Carolina to supply this material. This was attempted by the Tanner Company of Phoenix in trying to operate the Mica Mule Mine.

Q. Where is the Mica Mule located?

A. That's approximately 70 miles north of Phoenix, about 4 miles west of Black Canyon, Arizona.

Q. Was that deposit of mica comparable to the Sugar Loaf and the Honeycomb deposit?

A. Yes. In fact it appeared somewhat that the -- it was of the same or slightly better quality, the Sugar Loaf and the Honeycomb.

Q. Now based on your investigation, what problems or what was the success or lack of success, as the case may be, with the Tanner Brothers in developing the Mica Mule?

A. They attempted to use a pneumatic process to get a satisfactory recovery of the mica and they were never able to get a product that they could sell. They -- in order to get into the market, they were -- would have had to expend several million dollars, at least, in building a flotation process mill to get a satisfactory product, and the problem was that the thousand tons or so a month that they might expect to market would not justify the construction of such a mill.

Q. But that is a mill -- would a mill be essential to make the Honeycomb and the Sugar Loaf producing?

A. Yes. They would have to treat the material and get an upgraded satisfactory product.

Q. Am I understanding you to say that while the material is there, the market is not?

A. Yes, in a sense that with the present problem of attempting to get the quality of material, the necessity of -- to get a grade, that you'd have to build an expensive mill. That would work, but the problem is the expenses you'd have to go to would be not too much -- would be too much when you figure that you have to -- for the amount of product that you're going to turn out.

Q. In other words, the capitalization expense would far -- in your opinion, would far exceed the potential return.

(Tr. 11-13). The mineral examiner then concluded that based upon the cost of developing and operating a mine, and the existing and projected market conditions, it was his opinion that a prudent man would not spend his time and means with a reasonable expectation of making a paying mine (Tr. 13).

Witnesses for appellants presented evidence that there was a market for the product in the Los Angeles area and that there would be a competitive advantage for the property because of rail cost differential (Tr. 33). Appellants' expert witness also testified as to the quantity and quality of the mica located on the claims (Tr. 25-31). Appellants' expert witness testified that, based on his observations, there was valuable mineral in place (Tr. 28). Testimony was given by the mineral examiner regarding the necessity for using a flotation method for recovery of product and the capital cost of such beneficiation plant (Tr. 12). The witness for appellants stated that he had done no beneficiation tests and that he could not testify as to the plant which would be required to process the mica (Tr. 28).

[2] In order to become entitled to a mining claim, a claimant must establish the presence of a valuable mineral deposit. 30 U.S.C. § 22 (1976). A valuable mineral deposit exists where the mineral found is of such quality and quantity that a person of ordinary prudence would be justified in the further expenditure of his labor and means with a reasonable prospect of success in developing a valuable mine. Castle v. Womble, 19 L.D. 455 (1894). This is the "prudent man test," approved by the U.S. Supreme Court in Chrisman v. Miller, 197 U.S. 313 (1905). It has been refined to require a showing of marketability, i.e., that the mineral can be presently extracted, removed, and marketed at a profit. United States v. Coleman, 390 U.S. 599 (1968). Where a claim is located on land subsequently withdrawn from appropriation under the mining laws, the claim must be supported by a discovery at the time of withdrawal, as well as the date of the hearing into its validity. Cameron v. United States, 252 U.S. 450 (1920).

[3] When the Government contests the validity of a mining claim, it bears only the burden of going forward with sufficient evidence to establish a prima facie case. If a prima facie case is presented, the mining claimant then has the burden of overcoming that showing by a preponderance of the evidence. Hallenbeck v. Kleppe, 590 F.2d 85 (10th Cir. 1979); Foster v. Seaton, 271 F.2d 836 (D.C. Cir. 1959); United States v. Porter, 37 IBLA 313 (1978).

We conclude that the Government failed to present sufficient evidence to establish a prima facie case regarding the lack of discovery in 1962. The following testimony was given by the Government expert witness in cross-examination:

> Q. What was the price in 1962, did you check that out?
>
> A. No.
>
> Q. So you don't know whether this claim would have been economically feasible in the '62 era or not?
>
> A. No.

(Tr. 19).

However, a prima facie case was established in support of the allegation that the mining claims are invalid because a valuable mineral deposit had not been found within the limits of either mining claim at the date of the hearing.

We believe that appellants did prove to our satisfaction that there was a large quantity of mica on the claims (Tr. 28, 30). We are satisfied with the evidence presented with respect to the quality of the scrap grade mica (Exh. 5). We find that there is sufficient evidence to conclude that there is a market for scrap mica in the Los Angeles area, although appellants admit that the quantity which could be sold to this market is unknown (Tr. 33). We recognize that there would probably be a market advantage in the Los Angeles area, based on the rail haul differential between Yuma, Arizona, and North Carolina (Tr. 33). The mineral examiner testified that the market price for mica was $40 per ton f.o.b. minesite (Tr. 18). We will accept that figure.

Appellants' expert witness took 10 samples. The average assay of the 10 samples was 47.1 percent (Exh. 5 at 5). Using the value of $40 per ton for scrap mica and a 47.1 percent grade we calculate that the value of the product in the ground would be $18.84 per ton. Assuming these figures to be correct (as they are the most favorable figures for appellants' case) we can find no evidence that the product could be mined, upgraded to a marketable product, and delivered to a railhead for less than $18.84 per ton. In fact, appellants presented no evidence with respect to the cost of mining, beneficiation, or delivery to a railhead. However, evidence must be presented to demonstrate that the product could have been extracted and marketed at a profit. In failing to do so, appellants have failed to carry the necessary burden of proof that there was a discovery on the claims at the time of the hearing. Judge Mesch properly found the claims to be invalid by reason of a lack of discovery.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

R. W. Mullen
Administrative Judge

We concur:

James L. Burski
Administrative Judge

C. Randall Grant, Jr.
Administrative Judge